Whether the Assent of the President is Required for Constitutional Amendment in Nigeria

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Abstract

Unlike now that opinions are likely to differ on the desirability of constitutional amendment for a 6-year single term for the President of Nigeria or State Governors, Nigerians were one on the need to amend the Constitution for better electoral reforms that would enhance a more transparent and fair electoral process. In spite of the cordial relationship between the President and the National Assembly, the recent constitutional amendment has been a subject of legal debate that nearly truncated the entire electoral transition programme not because of disagreement on the subject matters of amendment but on the decision of the National Assembly that presidential assent is not required for constitutional amendment in Nigeria. The reactions that followed the decision of the Federal High Court presided by Hon. Justice Okechukwu Okeke that the constitutional amendment is inchoate until assented to by the President have also shown that the matter may not yet be finally settled. This paper examines the relevant statutory, judicial and available literature on the point at issue and reveals that section 9 of the Nigerian Constitution being the specific provision for constitutional amendment excludes from the general provision under section 58 of the Constitution and therefore concludes that the Constitution never contemplated the requirement of the assent of the President or State Governors hence the absence of any stipulated procedure for veto override by the legislature in the event of the President withholding his assent.

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1. Introduction

Nigeria operates a presidential system of government and its Constitution provides for separation of powers between the executive, the legislature and the judiciary with its inbuilt checks and balances which call for mutual cooperation among the organs of government.[1]

Even though the 1999 Constitution has been described as a legal but very illegitimate document because it was not made through a truly open and democratic process to make it a "people's document"[2], the Constitution remains the supreme law of the land until it is amended or repealed by the process stipulated in it.

The Constitution of the Federal Republic of Nigeria (First Alteration) Act,[3] amended 29 sections of the 1999 Constitution and provides among other things for the financial independence of the National Assembly and Independent National Electoral Commission (INEC).[4] It also deleted sections 66 (i) (h), 137 (1) (i) and 182 (1) (i) which disqualified a person for election to the office of the President, National Assembly and Governor of a State, if "he has been indicted for embezzlement or fraud by a Judicial Commission of Inquiry or an administrative panel of inquiry or a tribunal set up under the Tribunal of Inquiry Act, a Tribunal of Inquiry Law or any other law by the federal or state government which indictment has been accepted by the federal or state government respectively ostensibly to give legislative

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1 See ss. 4, 5 and 6 of the Constitution of the Federal Government of Nigeria, 1999, as amended, hereinafter, "Constitution"; *Tony Momoh v Senate of the National Assembly* (1981)1 NCLR 105; A. Kolo, "The Relationship between the State and Local Government Councils, and the Powers and Functions of Local Government Legislative and Executive Councils: A Legal and Policy Analysis under the Borno State Local Government Law, 2000", *University of Maiduguri Law Journal*, vol. 6, 2003, p. 44; see also E. Malemi, *Administrative Law* (3rd edn,), (Ikeja: Princetion Publishing Co., 2008) pp.52-55.

2 J. Ihonvbere, "Principles and Mechanisms of Building a People's Constitution: Pointers for Nigeria" in *Constitutional Essays Nigeria beyond 1999: Stabilizing the Polity through Constitutional Re-Engineering in Honour of Bola Ige*, M.M. Gidado, C.U. Anyanwu and A.O. Adekunle (eds.) (Enugu: Chenglo Limited, 2004) p. 99 at 103 – 104.

3 No 5, 2010.

4 *Ibid*. ss. 81 and 84.

approval to the decision of the Supreme Court in *Atiku Abubakar v INEC.*[5] Other sections also relate to recall of a member of the National Assembly and House of Assembly,[6] time of election to National Assembly and House of Assembly,[7] authorization of expenditure from consolidated revenue fund;[8] time of election of the president;[9] tenure of president[10] which relate to determination of the computation of four year term in case of a re-run election and which provides that if the person earlier sworn in wins, the time spent in the office before the date the election was annulled shall be taken into account. The amendment of section 180 as aforestated has been subject of spate of litigation[11]

Sections 145 and 190 which relate to the appointment of Acting President or Acting Governor during temporary absence of President[12] was amended in order to fill the lacuna on what should be done where the President is unable or fails to transmit the written declaration mentioned in section 145(1) to avoid the invocation of the doctrine of necessity as was witnessed during the absence of the Nigerian erstwhile President, Alhaji Musa Yar'Adua. The new sections 156(1) (a) and 200 (1)(a) forbid a member of INEC from belonging to a political party, while section 160(1)[13] provides that the power of INEC to make its own rule or otherwise regulate its own procedure shall not be subject to the approval or control of the President.

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5 (2007) 6 NWLR (Pt 103) 626.

6 *Ibid.*, ss. 69 and 110.

7 *Ibid.,* ss. 76 and 116.

8 *Ibid.*, s. 81

9 *Ibid.,* s. 132

10 *Ibid.,* ss. 135 and 180

11 See *INEC v Admiral Murtala Nyako and Ors* Unreported Suit No 5 CA/A/117/2011; CA/A/113/2011; CA/A/117/2011; CA/A/115/2011, CA/A/118/2011; CA/A/128/2011 delivered on April 7, 2011 by the Court of Appeal, Abuja Division and *Dr. Emmanuel E. Uduaghan v. INEC and ors*, unreported Suit No. FHC/ASB/CS/20 2011 delivered on March 15, 2011 by Hon. Justice I.N. Buba of the Federal High Court, Asaba Judicial Division.

12 *Ibid.*

13 *Ibid.*

Section 178[14] relates to time of election of state governor and section 228 (a) (b) is with respect to political parties and confers on INEC powers to ensure that political parties observe the practices of internal democracy including the fair and transparent conduct of party primaries, party congresses and party conventions. Section 229 deleted "association" as one of the words interpreted under that section. Sections 233 (2), 239, 246, 251, 272, and 285[15] relate to the jurisdiction of the court, the Election Petition Tribunals and the Election Petition Appeal Tribunals for the office of the President or his Vice, the Governor or Deputy, members of National Assembly and State House of Assembly.[16]

The recent constitutional amendments highlighted above have of late been a topical issue amongst a number of distinguished legal scholars, luminaries, jurists and of course informed members of the public including leading politicians in Nigeria as to whether the assent of the president is required for constitutional amendment in Nigeria[17] By the 1999 Constitution, the Executive is to administratively implement the policies of governance made into laws by the National Assembly. Even though the National Assembly is to make laws, the implementation of law is vested in the executive while the Judiciary is to interpret the laws.[18] The principle behind the concept of separation of powers is that none of the three arms of government under the Constitution should encroach into the powers of the other. The doctrine is to promote efficiency in governance by precluding the exercise of arbitrary power by all the arms and thus prevent friction[19]. Little wonder then that most Nigerians including respected legal minds

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14 *Ibid.*

15 *Ibid.*

16 The desirability or otherwise and the scope and application of these amendments would be discussed in another paper.

17 See O. Osinuga, "Nigeria: President's Assent not *sine qua non* for Constitutional Amendments" http://www.modernghana. com/news/ 2921 46/1/nigeria-president-assent-not-sine-qua-nonfor-non.html accessed on July 26, 2011.

18 *A. G. Abia State v A.G. F. (2003)* 4 NWLR (Pt. 809) 124; see ss. 4, 5 and 6 of the 1999 Constitution.

19 *A. G. Abia v. A. G. Federation, ibid.*

were surprised when the National Assembly insisted that presidential assent is not required for the 2011 amendment to the Constitution to have the force of law. Some others who have basic knowledge of government which is usually offered as a subject under General Certificate of Education examinations and the West African Examination Council Examinations were quick to rely on the doctrine of checks and balances, the power of the Executive to modify existing laws to bring them into conformity with the Constitution, the power of the Executive to veto the passage of certain bills; the power of the legislature to override such veto; the power of the executive to grant pardon to a convict and even the power of the legislature to impeach an executive to argue that the National Assembly might have constitutional basis for its assertion that presidential assent was not required for a constitutional amendment under section 9(2) for it to be validly passed.[20]

This humble attempt is aimed at evaluating the divergent views earlier expressed, examine relevant statutory provisions and review the judgment of a Federal High Court in Lagos presided over by Justice Okechukwu Okeke[21] to ascertain whether the assent of the president is required for constitutional amendment in Nigeria.

2. Legislative Process for Ordinary and Money Bills

The Constitution of the Federal Republic of Nigeria is essentially written because it is based on the principle of federalism which involves distribution of powers between the federal and state governments. Therefore, there is the need for such powers to be spelt out as clearly as language can permit so that each tiers of government is enabled to discover the sphere in which it may lawfully exercise power.[22] That is to say, the exercise of legislative power and its limits

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20 See generally ss. 315, 58, 59, 12, 143, and 188 of the 1999 Constitution, *A.G. Ogun State v. A.G. Federation* (1982) 3 NCLR 166, *A.G. Abia State v. A.G. Federation* (2003) 4 NWLR (Pt. 809) 124.

21 *Olisa Agbakoba SAN v The National Assembly* Suit No. FHC/C/CS/94/2010 (unreported) delivered, November 8, 2010.

22 I. A. Okafor and O. D. Amucheazi, *The Concept of True Federalism in Nigeria,* (Enugu: Snaap Press Ltd., 2008), pp. 14-15.

are usually clearly set out in a written constitution which is the fundamental and paramount law of the nation.[23]

The 1999 Constitution makes provisions for how bills can be passed into law. It contains specific provisions in respect of ordinary bills, money bills, alteration of the constitution, modification of existing laws to bring them into conformity with the provisions of the constitution; procedure in respect of enacting treaties into domestic laws, alteration of entrenched provisions of the constitution, creation of states e.t.c.[24]

For instance, section 58 of the 1999 Constitution which relates to ordinary bills provides that:

> (1) The power of the National Assembly to make laws shall be exercised by bills passed by both the Senate and the House of Representatives and, except as otherwise provided by subsection (5) of this section, assented to by the President.
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> (2) A bill may originate in either the Senate or the House of Representatives and shall not become law unless it has been passed and, except as otherwise provided by this section and section 59 of this Constitution, assented to in accordance with the provisions of this section.
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> (3) Where a bill has been passed by the House in which it originated, it shall be sent to the other House, and it shall be presented to the President for assent when it has been passed by that other House and agreement has been reached between the two Houses on any amendment made on it.
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> (4) Where a bill is presented to the President for assent, he shall within thirty days thereof signify that he assents or that he withholds assent.

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23 *Marbury v Madison* (1803) 5 US 137.

24 See generally, ss. 4, 8, 9, 12, 58, 59, and 315 of the 1999 Constitution.

> (5) Where the President withholds his assent and the bill is again passed by each House by two-thirds majority, the bill shall become law and the assent of the President shall not be required.

A law is mostly instigated by the demands and suggestions of individuals, interest groups or public institutions in form of bills to the relevant legislative body or bodies.[25]

Section 58 of the 1999 Constitution vests the power to pass a bill other than money bills into law after it has been assented to by the president. The process of passing such a bill was exhaustively considered in *National Assembly v. President of the Federal Republic of Nigeria and Ors*.[26] wherein the Court of Appeal considered sections 54(1), 56(1) and (2) and 58 of the 1999 Constitution and approved the process described by Turaki Esq (SAN) that a bill is passed by each House when it has gone through the first, second reading, the committee stage and the third reading. According to Turaki, a bill has to be sponsored either by the executive, the judiciary or any member of the two legislative Houses or private individuals, or organizations. It can be commenced in either of the two Houses. Second stage is first reading of the bill. This is a formal introduction of the bill without debate by the person presenting it or the person moving it. Where it is so read it is recorded in the journal of house for record purposes. A date is then fixed for the 2nd reading of the bill. 3rd stage is the 2nd reading of the bill where general debate on the bill is allowed. 4th stage is the committee stage, which may either be the Committee of the whole House or the standing Committee while 5th stage is the report stage. The report of the committee with observations and recommendations is presented to the whole house. 6th stage is the 3rd reading, the recommendation of the committee is debated and considered and when it is accepted the bill is taken as having been passed. 7th stage is the passage of the bill by the other house. 8th stage is the presidential assent.[27]

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25 A. O. Yusuff, "Legal Reasoning in Legislation," *An Introduction to Nigeria Legal Method,* Abiola Sanni (ed.) (Ile Ife: OAU. Press Ltd., 2006) 197.

26 (2003) 9 NWLR (Pt. 824) 104.

27 At pp. 110 – 111.

The court held among others that by virtue of section 54(1), the quorum of the Senate which consists of 108 senators and one from the Federal Capital Territory and the House of Representations which consists of three hundred and sixty members shall be one – third of all the members of each House and that any question proposed for decision shall be determined by the required majority of the members present and voting except as otherwise provided by the Constitution. According to the court, where the President withholds his assent to a bill, the bill shall pass through all the law making processes again except the presidential assent before it becomes law. The President would be deemed to have withheld his assent if he returned it to the National Assembly within 30 days or if he refused to sign the bill but retain possession of it. In which case, each House shall repeat the law making process except that section 54 (1) which prescribes one-third of the members for the purpose of quorum shall not apply, rather, in order to override the President's veto, it is two-thirds of each of the house i.e. at least 73 members in the Senate and at least 240 members in the House of Representatives. The interpretation of this provision by the Court of Appeal has been criticized by an erudite scholar who argued that once quorum is formed under section 54(1), a combined reading of sections 54(1), 56(1) and 58(5) reveal that two thirds majority of the members present and voting is the majority required to override the president's veto.[28]

Akande's view on the 30 days limitation was that the 30 days within which the President can either assent or withhold assent under section 58 (4) of the Constitution may not necessarily exclude public holidays as opposed to the American situation which put it's similar limitation to "within 10 days (Sundays excepted) after it shall have been presented to him, unless the Congress by their adjournment prevent its return, in which case it shall not be a law". According to the learned author,

> It was contended that the 10 days period applies only to the final adjournment of the session of Congress and not just any

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[28] See P. O. Idornigie, "Powers to Override Veto: How Exercised", *Rivers State University Journal of Public Law* Vol. 1, 2003, pp. 82-98 at 91-94.

> 10 day period during which Congress is not in session. Senator Edward Kennedy, the supervisor of the Family Practice of Medicine Act, filed a suit contending that the Act becomes law on December 26, 1970, 10 days (excluding Sundays) after it had been presented to President Nixon, President Nixon contended that his pocket veto killed the bill because on that day the Congress was on a six day Christmas recess, not returning to work until December, 28. The Court of Appeal for the District of Columbia upheld a lower court ruling that Senator Kennedy was right.

Akande also argued that unlike in America, a period of 30 days is such a long time that it is improbable that the National Assembly would be on recess for so long and it is therefore unlikely that such a problem could arise in the same way in Nigeria. And that if it does, the question will be whether the adjournment is one which, prevents the President from returning the bill to the House in which it originated within the time allowed, that is up till the last day of the 30 days[29].

Another possible practical challenge on the effect of the 30 days limitation presented itself when a Federal High Court presided by Justice Egbo-Egbo (as he then was) granted an *exparte* injunction for the parties to maintain the *stauts quo ante* after the National Assembly had already presented the passed bill on amendment to the Corrupt Practices and other Related Offences Act, 2000 to the President for his assent. The National Assembly purportedly passed the bill by veto override through a motion in a manner similar to what obtained in *National Assembly v. President of the Federal Republic of Nigeria*[30] on the ground that the President was deemed to have vetoed the bill by withholding it beyond the 30 days limitation period even though there was a pending order restraining the President from acting on the bill. The Supreme Court declared that the passage of the bill was not only intrinsically unconstitutional for not only passing through a wrong constitutional procedure, it was not duly passed also because it was

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29 J. O. Akande, *Introduction to the Constitution of the Federal Republic of Nigeria, 1999,* (Lagos: MIJ Professional Publishers Ltd., 2009), p. 143.

30 *Supra* note 26.

passed during the pendency of a court order.[31] Section 59 of the 1999 Constitution which is a specific provision for passage of money bills by the National Assembly provides that:

> (1) The provisions of this section shall apply to:
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> (a) an appropriation bill or a supplementary appropriation bill, including any other bill for the payment, issue or withdrawal from the Consolidated Revenue Fund or any other public fund of the Federation of any money charged thereon or any alteration in the amount of such a payment, issue or withdrawal; and
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> (b) A bill for the imposition of or increase in any tax, duty or fee or any reduction, withdrawal or cancellation thereof.
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> (2) Where a bill to which this section applies is passed by one of the Houses of the National Assembly but is not passed by the other House within a period of two months from the commencement of a financial year, the President of the Senate shall within fourteen days thereafter arrange for and convene a meeting of the Joint Finance Committee to examine the bill with a view to resolving the differences between the two Houses.
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> (3) Where the joint finance committee fails to resolve such differences, then the bill shall be presented to the National Assembly sitting at a joint meeting, and if the bill is passed at such joint meeting, it shall be presented to the President for assent.
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> (4) Where the President, within thirty days after the presentation of the bill to him, fails to signify his assent or where he withholds assent, then the bill shall again be presented to the National Assembly sitting at a joint

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31 See also Y. A. Fobur, "The Limits of Separation of Powers: Judicial Powers over Legislative Process, *MPJFIL*, Vol. 9 Nos. 3-4, 484 at 498 – 500; P.O. Idornigie," "Power to Override Veto *loc. cit*., note 28 at 94-95.

> meeting, and if passed by two-thirds majority of members of both houses at such joint meeting, the bill shall become law and the assent of the President shall not be required.
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> (5) In this section, "Joint Finance Committee" refers to the joint committee of the National Assembly on finance established pursuant to section 62(3) of this Constitution.

If a bill originates in either the Senate or the House of Representatives, it shall not become law until it has been passed by both Houses and agreement has been reached between the two Houses on any amendment made thereto and thereafter assented to by the President. If the President withholds his assent, the bill shall become law if it is subsequently passed by each House by a two-thirds majority.[32]

In the case of a money bill the above procedure will apply except, according to section 59(2), where a bill to which this section applies is passed by one of the Houses of the National Assembly but is not passed by the other House within a period of two months from the commencement of a financial year, the President of the Senate shall within fourteen days thereafter arrange for and convene a meeting of the Joint Finance Committee to examine the bill with a view to resolving the differences between the two Houses.

Where, however, the Joint Finance Committee fails to resolve such differences, the bill shall then be presented to the National Assembly sitting at a joint meeting, and if the bill is passed at such joint meeting, it shall be presented to the president for assent. In *A.G Bendel v. A.G.F. and 22 ors,*[33] the President sent a money bill to the National Assembly for enactment into law. The senate passed the bill with one set of amendments and the House of Representatives passed it with another set of amendments. The Joint Finance Committee was set up under section 58 (3) of the 1979 Constitution consisting of 12 members from each House to resolve the differences, but the bill was not sent back to National Assembly after resolution but was presented

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32 *A.G. Bendel v A.G. Federation and 22 ors* 7 UILR (Pt. 1) 107 at 131.

33 *Ibid.*

to the President for assent and the President assented to it. It was held first, that section 54[34] of the 1979 Constitution lays down a general procedure applicable to all bills presented to the National Assembly, but section 55 of the 1979 Constitution[35] is a special and additional procedure applicable only to money bill whenever the two Chambers have passed a money bill with different amendments.

Section 62(4) of the 1999 Constitution prohibits the National Assembly from delegating its legislative power to a committee and accordingly the Joint Finance Committee was not competent to pass a bill into law. The decision of the Joint Finance Committee on any money bill referred to it is not final; because its decision must be sent to the both Houses of the National Assembly for adoption or rejection. A money bill can not to be validly assented to by the President until the two Houses of the National Assembly sitting either separately or jointly have passed it into law.[36]

3. Process of Amending Entrenched Constitutional Provisions

The need to differentiate between general amendments which require only two-thirds of all members of each House of Assembly as opposed to special amendments which requires four fifth of all members of each House was, according to Akande, justified by the drafting committee of the 1979 Constitution which is similar to 1999 Constitution on the ground that "there must be obvious overwhelming support of the people before there could be further fragmentation of the Nation" or before the "civil liberty which is basic to social democracy" could be tempered with.[37]

The National Assembly and the State Houses of Assembly are jointly vested with the powers to amend the Constitution. Apart from the process of altering the provisions of the Constitution under section 9(2), the federal and state legislatures share the role of amending the Constitution for the purposes of creation and or boundary adjustment

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34 Now s. 58 of the 1999 Constitution.

35 Now 59, *ibid.*

36 See *A.G. Bendel v. A.G. Federation and 22 ors*, *supra* note 32.

37 Akande, *op. cit.* note 29, at pp. 45-46. P.O. Idornigie, "Division of Legislative Powers under the Constitution: Lessons from Recent Development," *Nigerian Bar Journal*, Vol. 1. No. 3, 305 at 311-322.

of new states[38] and local government areas, implementation of treaties[39] and also in making law for peace, order and good government.[40]

3.1 Creation of States

An Act for the creation of new state requires a request to be made to the National Assembly by two-third majority of members of the National Assembly and Local Government Councils representing the area comprising the proposed state subject to the approval by a two-third majority of the people of the proposed state in a referendum which must also be approved by a simple majority of the states in the Federation and a resolution by two-third majority members of each House of the National Assembly approving the creation of the proposed state.[41] It is profitable to note that in all these situations, the assent of the President is not required.

3.2 Boundary Adjustment of a State

An Act of the National Assembly for adjustment of the boundary of any existing state requires a request to National Assembly supported by two-third majority of National Assembly, House of Assembly of the affected states and local government councils representing the area to be affected by the boundary adjustment and approved by simple majority of members of each House of National Assembly of the affected states.[42]

3.3 Creation of New Local Government (L.G.A)

A law of the House of Assembly of a state for creation of new Local Government Area requires a request supported by at least two-third majority of members representing the House of Assembly and Local Government Councils affected to the House of Assembly of the state and approved by two-third majority of the people of the proposed Local Government Area in a referendum which result should be

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38 S. 8 of the 1999 Constitution as amended.
39 *Ibid.,* s. 12.
40 *Ibid.,* s. 4 (2) and (7).
41 *Ibid.,* s. 8(1).
42 *Ibid*., s. 8(2).

approved by a simple majority of each Local Government Council in a majority of the Local Government Councils in the state and a resolution by a two-third majority members of the House Assembly of the state approving the result of the referendum. The state shall then forward or make a return of the particulars of the names and headquarters of the new local government councils to the National Assembly for inclusion in part I and II of the First Schedule to the Constitution.

Even though the creation of local government areas is vested on the State House of Assembly, the House of Assembly shall after such creation render adequate returns to the National Assembly to enable it to make by an Act, consequential provisions with respect to names and headquarters of states or local government areas as provided in section 3 of the Constitution and parts I and II of the first schedule thereto by virtue of section 9(5) of the Constitution. While agreeing with the view of Akande that the drafting of these provisions are inelegant, Idornigie submitted that the provisions are not only ambiguous but incomprehensible" as it is difficult to determine the difference between a "request" under section 8(1)(a), (2) (a), (3) (a) and (4) (a) on one hand, and the word "proposal" under section 8 (1) (b), (3) (b) and (4) (b) of the Constitution on the other.[43]

The effect of the ambiguities spotted in application of these provisions can be appreciated during the dispute between the Federal Government and Lagos State Government when the latter purportedly created local government areas under section 8(3) of the Constitution and the Federal Government withheld the statutory allocation of funds due to the Local Government Councils until the state reverted to the constituent Local Government Area specified in part I of the Schedule to the Constitution.[44]

3.4. Boundary Adjustment of an Existing L.G.A

A law of the House of Assembly of a state for boundary adjustment of an existing Local Government Area, requires a request supported by two-third majority of the members representing the area in the House

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43 Idornigie, *op. cit,* note 37 at 310. See also Akande, o*p. cit.,* note 29 at 41.

44 See *A.G. of Lagos State v A.G. of the Federation* (2004) 12 SCNJ 1.

of Assembly and Local Government Area to be affected by the adjustment to the House of Assembly of the state and to be approved by a simple majority of members representing the area to be affected in the House of Assembly.[45]

3.5. Fundamental Rights

Fundamental Rights enshrined in the Constitution include, Rights to Life,[46] Dignity of Human Person,[47] Personal Liberty,[48] Fair Hearing,[49] Private and Family Life,[50] Freedom of Thought, Conscience and Religion,[51] Freedom of Expression and the Press,[52] Peaceful Assembly and Association,[53] Freedom of Movement,[54] Freedom from Discrimination,[55] and Acquisition and Ownership of Immovable Property anywhere in Nigeria.[56]

Section 44 also forbids unlawful compulsory acquisition of property subject to certain limitations while section 45 provides restriction on, and derogation from fundamental rights. Section 46 provides for special jurisdiction of High Court and legal aid for the enforcement of fundamental rights.

According to Azu, the concept of Human Right is generally seen as being congenital with nature. It is in effect regarded as inalienable, imprescriptibly and inviolable to man because such rights constitute the very essence of living. Human Rights are inviolable and concomitant to life. Thus, the provision and protection of human rights have been canvassed both at international and domestic spheres of governance expressed in such documents as the Universal Declaration of Human Rights, the International Covenant on Civil and Political

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45 S. 8(4) of the 1999 Constitution.
46 *Ibid.* s. 33.
47 *Ibid.* s. 34.
48 *Ibid.* s. 35.
49 *Ibid.* s. 36.
50 *Ibid.* s. 37.
51 *Ibid.* s. 38.
52 *Ibid.* s. 39.
53 *Ibid.* s. 40.
54 *Ibid. s*. 41.
55 *Ibid.* s. 42.
56 *Ibid.* s. 43.

Rights, and the International Covenant on Economic, Social and Cultural Rights.[57]

3.6 Implementation of Treaty

Section 12 of the Constitution provides that:

1) No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.

3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.

It has been observed that treaty making is usually one of the external functions of a President under a presidential system of government, but that problems however may arise where implementation of a treaty requires legislative action relating to residual matters as this shall require the ratification of the Act of the National Assembly by a majority of the states before it can have the force of law.[58]

One important feature of this provision as it relates to this article is the implied provision of the requirement of the assent of the president under section 12 (3) which provides that:

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57 See U. E. Azu, "A Bi-juridical Comparison of Human Rights Protection in the Anglophone and Francophone West Africa – A Case Study of Nigeria and Senegal", Unpublished *Seminal Paper for LL.M. Dissertation, Faculty of Law, University of Nigeria, Enugu,* April, 2008, Abstract page.

58 See Akande, o*p. cit.* note 29 at p. 57. See also Idornigie, "Division of Legislative Powers," o*p. cit.* note 37 at p. 324.

> A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the House of Assembly in the Federation.

The requirement for assent under section 12(3) can be construed with the absence of similar requirement for presidential assent under section 9(2) of the Constitution. The importance of this discovery will be better appreciated when the scope and application of section 9(2) of the Constitution is examined later in this article as it is germane to determining whether it is the intention of the drafters of the Constitution to make presidential assent a requirement for the amendment of the Constitution envisaged under section 9(2).

3.7. Alteration of the Constitution

An unwritten constitution is flexible as it allows easy and quick decision to meet the exigencies of the society but difficult to ascertain unlike written constitution which is rigid and clearly defines a comprehensive legal framework that regulates the affairs of the nation. Examples of countries operating rigid constitutions include Nigeria, United States, Australia, Canada, France, Ghana, Sierra Leone, South Africa e.t.c.[59]

Section 9 of the 1999 Constitution is the specific provision for amending the Nigerian Constitution and it provides as follows:

> (1) The National Assembly may, subject to the provision of this section, alter any of the provisions of this Constitution.
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> (2) An Act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds

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[59] See E. Malemi, *The Nigerian Constitutional Law,* (Ikeja: Princeton Publishing Co., 2006), p. 22.

> majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.
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> (3) An Act of the National Assembly for the purpose of altering the provisions of this section, section 8 or Chapter IV of this Constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four-fifths majority of all the members of each House, and also approved by resolution of the House of Assembly of not less than two-third of all States.
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> (4) For the purposes of section 8 of this Constitution and of subsections (2) and (3) of this section, the number of members of each House of the National Assembly shall, notwithstanding any vacancy, be deemed to be the number of members specified in sections 48 and 49 of this Constitution.

The Constitution being the fundamental document by which the country is governed and regulated should not be a document that will be readily available for amendment as one will do to a subsidiary law or some enactments or other Acts of Parliament because the need to tinker with the Constitution must arise from a fundamental and a major issue rather than a cursory point or maybe some sponsored opinion or view of what some people think the law must be.[60]

This is because a document which outlast every other laws that comes into existence, is the foundation on which such other laws are built so if one continues to make it readily available for tinkering, or amendment, or alteration, one may be rocking the structure on which it is built,[61] thereby leading to uncertainty and difficulties.

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60 A. M. Ajibola, "Presidential Assent on Amended Constitution Diversionary," posted on August 19, 2010 and available http://www.vanguardngr.com/2010/08/presidential-assent-on-amended-constitution-diversionary-ajibola accessed on July 27, 2011.

61 *Ibid.*

The rigorous requirement in the procedure for amending the Constitution is a desirable thing[62] However, once the National Assembly receives the required approval of the State legislatures, it then sets a timetable for the effective date and commencement of the new Constitution. This process of ratification is what is contained in section 9 of the 1999 Constitution and no other meanings should be read into it. According to Oladele:

> The reason is simple, what would happen if the President refuses his assent after being approved by the National Assembly and ratified or approved by the state legislatures as provided for under section 9 of the Constitution? Can the President veto it because he has the power of veto? The answer is No. Presentation of the amended Constitution to the President for assent is unsupported by law and may constitute an infraction of the Constitution itself. It should not be contemplated at all.[63]

Oladele further submits that:

> The drafters of the 1999 Constitution knew that at some point, it would be necessary for the Constitution to be amended particularly since the Constitution was not a product of the people. Nonetheless, they were also determined to make such changes difficult to achieve so as not to turn the Constitution into a cheap and ill-conceived document while at the same time maintaining a delicate balance for amendment in order not to unduly frustrate the wish of the people; hence, the requirements in section 9 of the 1999 Constitution. If the framers wanted a presidential assent, they would have unequivocally stated that in the Constitution and it would not be a subject of legal debate.[64]

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62 *Ibid*.

63 Kayode Oladele, "Constitutional Amendment requires no Presidential Assent" posted on August 19 2010, and available at http://www.vanguardngr.com/2010/08/ constitu tional-amendment-requires-no-presidential-assent/ accessed on 27, July 2011.

64 *Ibid.*

By way of comparison, Oladele said that the United States Constitution which is the oldest written constitution in the world today has undergone 27 amendments to date and regardless of how the amendments were proposed by the Congress, they were only ratified by three-fourth of the State legislatures for them to become effective. According to him, there are also no records to indicate that any of the amendments was signed by the President before becoming operational; rather, what is written in the US Constitution is the date each amendment was ratified.[65]

Oladele also explained that amendment to the United States Constitution may be done in three ways namely: first, the new amendment may be approved by two-thirds of both Houses of Congress, then sent to the state legislatures for approval, second, two-thirds of the state legislatures may apply to Congress for a Constitutional Convention to consider amendments, which are then sent to the states for approval and finally, Congress may require ratification by special Convention. The convention method has been used only once, to approve the 21st Amendment repealing Prohibition, (1933). Regardless of the method of proposing an amendment, final ratification requires approval by three-fourths of the states and no consent or signature of the President is necessary. Oladele concluded that the only method for amending the 1999 Constitution is as prescribed in section 9 of the Constitution. And that being the case, the approval of the two-thirds of the state legislatures is what is needed to ratify the amendment.[66]

A learned writer distinguished an American case based on its facts in relation to time limit when he argued that the United States case of *Hollingsworth v Virginia*[67] is limited to its facts and not necessarily an authority to dismiss the requirement for presidential assent to a constitutional amendment in a democratic dispensation. According to Adega, the bill evidencing the proposed amendments was submitted to the President more than ten days before Congress went on recess and the court's decision was that presidential assent

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65 *Ibid.*

66 *Ibid.*

67 3 U. S. (3 Dall.) 378.

was not required in a situation where the bill was submitted to the president at least ten days before the Congress went on recess. Although this decision now stands for the proposition that a president's assent is not required for constitutional amendments in the United States, the court has not had to deal with a situation where the president got the bill less than ten days before Congress went on recess or when Congress was actually on recess.[68]

Adega pointed out the important distinction between the use of the words "A Bill" under section 9 and "An Act" under section 58 and wondered whether the differences spotted was intentional and consequential.[69]

On the difference of procedure under sections 9 and 58 of the 1999 Constitution, Adega submitted that:

> Section 58 describes how the National Assembly should go about initiating a bill, sending it to the President for assent or veto and in the case of a veto, the procedure for overriding the veto. On the other hand, section 9 of the same Constitution describes the process the National Assembly should employ in passing an Act. Section 9 does not make mention or refer to presidential assent, veto or procedure for overriding a veto, yet it authorizes the passage of an Act by the National Assembly. It is important to bear in mind the difference between a Bill and an Act and the different journeys they take to their destinations. A Bill becomes an Act after it has received Presidential assent or where such assent is not forthcoming, the National Assembly may override a presidential veto with the required 2/3 majority. On the other hand, an Act can be described as a Bill that does not require presidential assent or subject to a presidential veto because it becomes law once it is passed and section 9 of the 1999 Constitution authorizes the National Assembly to pass an Act with respect to

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68 Majek Adega, "*Can the President Override a 2/3 Majority Vote?*" posted on November 13, 2010 and available at http://saharareporters.com/article/can-president-override-23-majority-vote accessed on 27 July, 2011.

69 Adega, *ibid*.

> constitutional amendments once all the other conditions of the section have been complied with. If a Bill requires presidential assent or veto override to become an Act, why did the framers of the 1999 Constitution describe the output of the National Assembly under section 9 of the 1999 Constitution as an Act rather than a Bill? [70]

Adega also pointed out the different requirements under both sections when he said that:

> Under section 58 of the Constitution, the National Assembly can only pass a bill at the first instance with a simple majority of both Houses. Its power to pass an Act can only be exercised after the president has withheld his assent or vetoed the bill. Thereafter, the National Assembly can convert its hitherto Bill into an Act though a 2/3 majority vote which has the legal implication of dispensing with presidential assent. The procedure under section 9 is quite different. Under that section, the National Assembly cannot, even at first instance, attempt to pass an Act "unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the House of Assembly of not less than two-thirds of all the states" section 58 does not require that Bills coming out of the National Assembly be supported by 2/3 majority, yet section 9 stipulates that no Act can be passed by the National Assembly under section 9 unless such Act is supported by 2/3 majority of the member of both Houses of the National Assembly and the Houses of Assembly of all the states. Is this a mistake or a deliberate attempt to create two different regimes for the enactment of two different sorts of law with different implications? [71]

To drive home his point that presidential assent is not required, Adega raised the following issues:

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70 *Ibid.*

71 *Ibid.*

> If we are to accept for a moment that the requirements for passing a Bill under section 58 are the same as those for passing an Act under *section 9,* why were the two sections needed when one would have been good enough? How can one explain the incongruence created by the fact that the 2/3 majority needed to override a presidential veto under section 58 in order to convert a Bill into an Act is the basic prerequisite for passing an Act under section 9? [72]

He finally concluded that:

> Given the differences in the language employed in drafting both sections 58 and 9*,* the differences in procedures and conditions precedent to the exercise of the powers granted under each section, I have come to the conclusion that section 9 of the 1999 Constitution authorizes the Nation Assembly to amend the Constitution without the President's assent for several reason. I believe the use of the words Bill and Act in the respective sections is deliberate. I submit that section 58 is intended to give the President some measure of control over Bills coming of the National Assembly unless popular support for such Bills can be demonstrated through a 2/3 majority. These Bills, being proposed laws for the ordinary administration of the country take or find their roots in the Constitution and are subject to broader constitutional and other legal challenges. On the other hand, I believe section 9 is designed to put the issue of constitutional amendment in the broader political domain by requiring the approval of two thirds majority of the Houses of Assembly of the states and the National Assembly. I believe the National Assembly's powers to pass an Act at first instance under section 9 of the 1999 Constitution is the inevitable concomitant of the stringent 2/3 basic requirement under that section. If the President's denial of assent or veto of a Bill can be defeated with a 2/3 majority of the members of the National Assembly only under section 58*,* does it make any political or legal sense that the same President is able to deny assent for or veto an Act passed by representatives of the people from at least 2/3 of the Houses of Assemblies of all

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72 *Ibid.*

the states of the Federation and 2/3 of the members of the National Assembly?[73]

Apart from the convincing issues raised by Adega, Adekunle also observed that section 9(4) qualifies section 54 of the Constitution which prescribes one – third of the members by providing that the number specified under the Constitution. i.e. 109 members of the Senate and 350 members of the House of Representatives shall form a quorum which means that the proportion of votes shall be based not on members "present and voting" but on the actual numerical strength of members. However, the same requirement is not applicable to the resolution of the state assemblies.[74] The recent constitutional amendment has allayed the fear that these rigorous provisions would be difficult to be met. The process of amending the Constitution has been criticized as being purely designed to frustrate amendments because it is cumbersome, expensive and could only be seen as a strategy to maintain an undemocratic *status quo*.[75] There is no doubt that legislative process is not only cumbersome and time consuming, it is also complex and demanding but it must also be borne in mind that Nigeria is still at the rudimentary and experimental stages of its democratic and constitutional development and every effort should be geared at promoting true constitutionalism and sustainable national development of the country.[76]

5. Case Review: *Olisa Agbakoba SAN v The National Assembly and Anor.*[77]

The plaintiff sued the National Assembly and the Justice Minister as respondents. He challenged the legality of the claim by the federal

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73 *Ibid*.

74 See A. O. Adekunle, "A New or Amended Constitution? What is the best option for Nigeria", in *Constitutional Essays Nigeria Beyond 1999: Constitutional Re-Engineering in Honor of Bola Ige;* G. M. Gidado, C. U. Anyanwu and A. O. Adekunle (eds) (Enugu: Chenglo Ltd., 2004) p. 40.

75 J. Ihonvbere *Constitutional Essays* in note *74*, *Ibid* at pp. 108-109.

76 A. O. Yusuff. *op. cit.,* note 25 at p. 216.

77 Suit No. FHC/L/CS/941/2010, (Unreported) delivered by Hon. Justice Okechukwu .J. Okeke of the Federal High Court Lagos on November 8, 2010.

lawmakers that the assent of the President was not required on the amendments they made to the 1999 Constitution before it becomes law and therefore asked for a declaration by the court that the "Constitution (First Amendment) Act 2010" passed by the National Assembly cannot take effect as law without the assent of the President.

The plaintiff further contended that the exercise by the lawmakers without the assent of the President was illegal and unconstitutional, and urged the court to nullify the amendments on the grounds that the National Assembly had contravened section 58 of the 1999Constitution. The plaintiff through his counsel had at the last adjourned date adopted his written arguments and urged the court to dismiss the preliminary objections filed by the defendants and to grant all the reliefs.

In his judgment, Justice Okeke citing section 2 of the Interpretation Act noted that the Constitution, having come into law through an Act, can only be amended through an Act, and that an Act of the National Assembly cannot become a law without the assent of the President.

The court added that the National Assembly could only go ahead to enforce the Constitution if the President refused to sign it within 30 days of receipt.

"Having failed to comply with the provisions of section 58 of the Constitution, the purported 2010 amended Constitution remains inchoate until it is presented to the President for his assent," Justice Okeke ruled.[78]

Reacting to the judgment, Prof. Yemi Osibanjo (SAN) hailed the judgment of the court when he argued that a constitutional amendment is an Act of the National Assembly and therefore an Act of the National Assembly requires presidential assent. Speaking on behalf of the Senate, the Chairman, Senate Committee on Media and Information, Senator Ayogu Eze, however disagreed with the judgment when he declared that:[79]

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78 *Olisa Agbakoba SAN v The National Assembly and Anor. supra* note 77.

79 Fortune, "Constitution Review needs President's Assent, Court Rules," http://www.nigerianbestforum.com/index. php?topic=95894.o;wap accessed on July 26, 2011.

> We believe we were right in reaching the decision we did. One should have asked why the governors did not sign the amendment at the time it went to the states for approval. We were also guided by practice and conventions of other older democracies. The United States of America (USA) passed through the same argument after the Congress passed the bill of rights but the Supreme Court in that country ruled that the assent of the President was not required to alter the Constitution.
>
> Members of the National Assembly embody the mandate and sovereignty of the people and the people speak through them. Sovereignty in a democracy belongs to the people and not to any office. We shall, however, abide by the final outcome of the litigation. We shall definitely appeal this decision which we think did not reflect the spirit and intent of the constitution," Eze said.

According to the Nigerian Bar Association (NBA) President, Joseph Bodurin Daudu (SAN):

> The NBA stands for the rule of law and supports any process that enthrones constitutionality of laws and due process. The judgment at least as at today is correct until disturbed by a higher court. The NBA however cautions that time are scarce commodity vis-a-vis the electoral timetable for the 2011 general elections. In that regard, although parties have an undoubted right of appeal against decisions that did not go in their favour, the country can ill afford to bask in the luxury of that exercise. In the overall interest of the nation once the present exercise of amendment is concluded it should be sent to the President for assent after elections' legal battle may resume.

According to Femi Falana, the decision of Justice Okechukwu Okeke cannot be justified under section 9(2) of the Constitution of the Federal Republic of Nigeria, 1999 and reliance on section 58 of the

Constitution by the Federal High Court was "totally unnecessary as there is no nexus between it and section 9 of the Constitution."[80]

On whether one man in the position of the President should be able to veto what has been approved by the people of Nigeria, Ayo Turton submitted that:

> This question overlooks the fact that the Presidency is also a representative of the people as much as the National Assembly with a requirement for a vote spread of a least 1/3 of 2/3 of states in the Federation to be elected, specifically for widespread acceptance. Then the referendum is not an end in itself but a voice of the people to trigger an "Act of the National Assembly" and the "Act of the National Assembly" itself will have to follow its own due process when triggered. On why Governor's assents are not required at the State level-A Constitutional amendment is an Act of the National Assembly in transit through State Assemblies following due process, not an Act of the State Assembly that ends with State Assembly requiring a Governor's consent, what is required in State Houses is "resolution" but "passed" by the National Assembly. State Governors do not sign resolutions![81]

What we have done so is to present the issues raised by legal scholars and reactions of notable Nigerians on the High Court judgment. A passionate consideration of the issues raised by the Judge and arguments advanced by the parties would have not only enriched constitutional development through case law in Nigeria but would have enabled legal minds and the general public to appreciate the basis of the conclusion of the case to justify the verdict.

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80 Femi Falana, "Constitutional Amendment: Presidential Assent Not Required", November 22, 2010, available on http://saharareporters.com/article/constitutional-amendment-presidential-assent-not-required, visited on July 28, 2011.

81 Ayo Turton, "Presidential-Assent-to-Constitutional-Amendment-Bills-A must", posted on November 12, 2010, available at http//saharareporters.com/article/presential-assent-constitutionalamendment-bills-must and accessed on July 27, 2011.

> Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another bothers on the validity of any Act and the decision necessarily rests on the competency of the legislature to so enact, the courts in the exercise of their solemn duties, determine whether the Act is constitutional or not, and such an exercise of power is the ultimate and supreme function of the courts. It is legitimate only in the last resort, and as a necessity in the determination of the real, earnest and vital controversy.[82]
>
> Written constitutions contemplate judgment written as an art by itself in which every individual has its own peculiar style and method. However, it must be pointed out here that a good judgment is required to contain some well known constituent parts such as the issues for determination, the essential facts and evidence filed in the case, the resolution of the issues of fact and law raised in the case, the conclusion or general inference drawn from facts and the law as resolved, and the verdict and orders made by the court.[83]

It is therefore, with due respect, that the trial judge in this case merely reproduced the submissions of the parties without resolving the issues of law raised before delivering the verdict of the court.[84]

The requirement for presidential assent and the attendant power of veto in spite of the rigorous procedure of amending the Constitution stipulated under section 9(2) could vitiate the potency of the will of the people as expressed though overwhelming majority of its representatives in the National Assembly and those of the State Houses of Assembly by an arbitrary and totalitarian President at critical moments even when constitutional amendment is not only imperative but desirable for common good and a stable polity. The requirement of the assent of the President though based on the doctrine of separation of power, its main purpose was to save the people from autocracy and thereby preclude the exercise of arbitrary tyrannical powers.

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82 *Chicago v Wellman* 12 U.S. Supreme Court Reporter 400, at 402.

83 *A.G. Federation v Abubakar* (2007) 10 WRN 1 at 16; See also *Ogba v Onwuzu* (2005) 6 SC (Pt. 1) 41 at 49.

84 *Nigeria – Arab Bank Ltd, v Comex Ltd*. (1999) 6 NWLR (Pt. 608) 648 CA.

Perhaps mindful of the fatal consequences of out rightly declaring the amendment a nullity since the on-going electoral process was based on the supposition that there was a valid amendment. The trial judge exercised its discretion by adopting a middle course approach when it refused to grant any declaratory relief urged by the parties when it neither upheld the constitutional amendment nor declared the amendment a nullity.

Section 2 of the Interpretation Act[85] states in subsection 1 that; "An Act is passed when the President assents to the Bill for the Act whether or not the Act then comes to force."

This writer agrees with Osinuga's argument that the aforestated provision is not applicable. According to him, the reference to section 2 of the Interpretation Act which states in subsection (1) that, ''An Act is passed when the President assents to the Bill for the Act whether or not the Act then comes into force'' is not applicable to the sections amending or altering provisions of the Constitution. This is because by virtue of the supremacy clause of the Constitution, the provisions of the Interpretation Act are not binding on the constitution. The provisions of the Interpretation Act where in this case it conflicts and is not compatible with the provisions of the Constitution is invalid, null and void to the extent of its inconsistency. In other words section 2 (1) of the Interpretation Act does not prevail over the provisions of the Constitution.

Furthermore the statutory backing of the process of enacting constitutional amendments should only be made within the context of the Constitution. Any reference to other laws or statutes other than what is provided for in the Constitution particularly when the President is only replicated in one other section of the Constitution.[86]

On the absence of the words "a bill," Osinuga further argued that:

> Another distinction much overlooked is the fact that sections 8 and 9 expressly state an, '*Act of the National Assembly'* whilst the other Sections of the Constitution (explained

[85] Cap I 23, LFN, 2004.

[86] Omoba Oladele Osinuga, *loc. cit.,* note 17.

> further in this article) expressly state 'a bill'. Whilst in the ordinary meaning of the word within legislative parlance 'an Act' or 'bill' may have the same meaning, it is my view that 'an Act' under the legislative framework of the provisions where it is expressed its use is to give sections 8 and 9 more purpose and clarity given the provisions of the enabling sections. The use of the word 'Act' augments the intent of these sections. In other sections the word 'bill' is used as a precursor to the word 'an Act' to read, '*A bill for an Act of the National Assembly'* to give the provisions of those sections meaning. The absence of 'A bill' in the sections 8 and 9 is intentional to distinguish the force of the constitutional amendment provisions inherent and expressed in these sections.[87]

In interpreting the Constitution, the court should not only adopt a liberal approach, it must employ care and always bear in mind that the circumstances of the nation is taken into consideration bearing in mind the historical facts which are necessary for comprehension of the subject matter and also ensure that the mischief which it is intended to deter is arrested.[88]

Section 12 (3) provides that:

> 3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.

It is manifest from this special provision that the assent of the President is required for the purpose of enacting a treaty under section 12 into an Act. The failure of the courts to resolve the effect of the

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87 *Ibid*.

88 See generally *Chiranjit Lat v Union of India* (1951) A.R. 41 at 58; *Nafiu Rabiu v Kano* State *(*1980) 7 S.C. 124, *Ukaegbu v A.G. Imo State* (1983) I SCNLR 212; *Uwaifo v A.G. Bendel* (1982) 7 S.C. 124; *Bronik Motors v Wema Bank* (1983) I SCNLR 296; *Mobil v FBIR* (1977) 3 S.C. 53 and *A.G. Federation v Abubakar supra* note 83 at p. 48.

express mention of the presidential assent under section 12 which is one of the special provisions for legislative procedure under the Constitution and the absence of the same requirement for the assent of the President under section 9 is with due respect a fundamental deliberate provision which ought to have affected the conclusion of the court in this case. On the purport of section 318 which defines an Act of the National Assembly to mean "any law made by the National Assembly", one may need to ask whether a constitutional amendment under section 9(2) could truly be said to be a law made by the National Assembly *per se* since as earlier highlighted the approval by a resolution of the two third majority of the states Assembly is required?

This is more so that the introductory part of the same section 318 (1) expressly made the "interpretation of words provided therein subject to other section of the Constitution or where the context otherwise expressly provides or the context otherwise requires".

7. Conclusion

No provision is inferior to the other, and a *fortiori* no provision is superior to the other. We have demonstrated in this attempt that there is nothing in the provisions of section 58 that makes its provisions to apply to every conceivable legislative powers exercised under the Constitution nor can it be said to have "covered the field."

Even though the Supreme Court has consistently championed the liberal interpretation of the Constitution for purposes of expanding the frontiers of the Constitution to accommodate as much foreseeable and proximate situations as possible, it is trite that the golden and main rule of the interpretation of statutes, including the Constitution, is the intention of the lawmakers. Once the intention of the law maker is clear, resort cannot be made to any liberal interpretation of the Constitution. This, according to the Supreme Court is "because a liberal interpretation of the Constitution beyond and above the intention of the lawmaker will amount to the judge making law and that while there is a vibrant debate as to whether the judge should make law, it will be against the principle of separation of powers for the judge to make law where the intention of the law maker is clear."[89]

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89 *INEC v Musa*, (2003) 3 NWLR (Pt. 806) 72 at 110.

Even though most written constitutions are by nature classified as rigid, the rigidity is however not to the point of perversity. In the interpretation of a statute, the mischief which a provision is set out to cure must not be lost sight of. Having provided for a rigorous specific procedure for amending the Constitution under section 9(a), the requirement of a presidential assent would lead to manifest absurdity especially when withholding of such assent is not an impossibility. Most importantly, the Constitution did not provide for a special procedure for overriding such exercise of veto power which is expected to be more difficult than the initial process of passing the constitutional amendment under section 9(2*)* as it has done in respect of ordinary and money bills under sections 58(3) (4) & (5) 59 (3) (4) & (5) of the 1999 Constitution.

There is nowhere in the Constitution where it provides for presidential assent for the purposes of amending it under section 9(2), therefore, where the Constitution sets the condition for doing a thing, no other legislation or judicial decision can alter those conditions either by directly or indirectly subtracting therefrom or adding thereto unless the Constitution itself, bearing in mind, of course, that provisions in a Constitution are of equal strength and constitutionality.

The normal rule of interpretation of the Constitution or of any statute is that general provisions must give way to special provisions. The Court of Appeal in *National Assembly v President*[90] held that the special provision of two-thirds majority of each House or of a joint sitting of both Houses takes supremacy over the general provisions of the statute with regard to quorum and a simple majority requirement earlier considered in this article. It is trite that where two sections exist side by side in respect of the same subject matter, the specific provisions are by implication excluded from the general provision. Thus, the specific provisions of section 9(2*)* of the Constitution excludes from the general provision in section 58 (4) and (5) relating to the presentation of a bill to the President for his assent or withholding of assent.[91]

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90 *Supra* note 119.

91 See *Government of Kaduna v Kagoma* (1982) All NLR (Pt. 1) 150 S.C; *A.G. Abia State v A.G. Federation* (2002) 6 NWLR (Pt. 763) 264.

There cannot be difficulty in ascertaining the intention of the makers of the Constitution that section 58 has no universal application to all legislative processes envisaged under the Constitution because it provides specific procedure on certain subject matters other than ordinary bills such as money bill,[92] state creation,[93] boundary adjustment of an existing state,[94] creation of new local government area,[95] boundary adjustment of an existing Local Government Area,[96] amendment of Fundamental Human Rights provisions in Chapter IV of the Constitution,[97] implementation of existing laws such as the National Youth Service Corps Decree 1993, the Public Complaints Commission Act; the National Security Agencies Act; and the Land Use Act.[98] Others are the power of the President or a State Governor who is the Chief Executive of the Federation and the state respectively to modify an existing law[99] in spite of the doctrine of separation of powers enshrined in the Constitution and the legislative powers vested in the National Assembly and the State Assemblies under section 4 of the 1999 Constitution. It was in recognition of the Nigeria peculiarities in fashioning its own Constitution due to historical and contemporary factors that the Supreme Court held in *A.G. Abia v A.G. Federation*[100] that the President did not breach the principles of separation of powers when he single handedly repealed the Allocation of Revenue (Federation Account, Etc) (Modification) Order, 2002 without any recourse to the National Assembly which ordinarily is the legislative arm of the Federal Government.

Therefore, it is our humble submission that the absence of the requirement for presidential assent might arguably be a breach of the principle of separation of powers which is merely an ideal to follow as

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92 S. 59 1999 Constitution
93 *Ibid* s. 8(2).
94 *Ibid* s. 8(2).
95 *Ibid* s. 8(3).
96 *Ibid* s. 8(4).
97 *Ibid* s. 9(2).
98 *Ibid* s. 315(5).
99 *Ibid* s. 315(1) (4).
100 *Supra* note 91.

a guide and a doctrinal aberration authorized by the Constitution itself.[101]

Therefore in the absence of a specific provision on how presidential veto can be overridden for the purpose of amending the Constitution under section 9(2); and since section 58 (3) to (5) requires only 2/3rd majority votes of all the members to override the President's veto, it will be safe to conclude that it is the intention of makers of the Constitution to dispense with the assent of the President since as rightly pointed out by Sagay; "you can pass normal bills, which the President refuse to give assent by two-third majority, then if you have a two-third majority provided in the Constitution for the constitutional amendment, whether the President signs it or not, the amendment will still come into being."[102]

Legally speaking, constitutional amendment is not treated like an ordinary bill. It is an extraordinary act of the legislative arm involving both the National Assembly and the State Assemblies.[103]

An Act for constitutional amendment is therefore not the same with an ordinary Act of the National Assembly under section 58 of the Constitution given the sanctity of the Constitution, the framers and drafters of the Constitution deliberately erred on the side of caution to ensure that the legislature in the exercise of its powers to amend and alter the Constitution is not constrained by the executive arm of government in exercising its powers.[104]

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101 *Ibid.* See also *Garba v FCSC (1988)* 5 NWLR (Pt. 94) 323; *Tukur v Government of Gongola State* (1989) 4 NWLR (Pt. 117) 517; P. A. Oluyede, *Nigerian Administrative Law,* (Ibadan: University Press Ltd, 1988) p. 43.

102 See E. Ogala, "Lawyer says President's Assent not Crucial to Constitutional Amendment" available at http://234next com/csp/cms/sites/next/home,547228/story.csp. accessed on July 25, 2011.

103 See Kayode Oladele, "Constitution Amendment doesn't require Presidential Assent" http://www.nigeria bestforum. com/ generaltopics/?p_57748 accessed on July 25, 2001.

104 *Ibid*.